Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

ALAN B. LEVAN AND BANKATLANTIC FINANCIAL CORPORATION,
Petitioners,

v.

CAPITAL CITIES/ABC, INC. AND WILLIAM H. WILLSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a defamation action, an appellate court's "independent review" of the trial record, as contemplated by *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), can supplant a jury's findings on preliminary questions regarding a broadcast's "gist" and its falsity, as the Eleventh Circuit has now held, or must be confined to the question of actual malice, as other courts of appeals have held.

2. Whether, in conducting "independent review" in a defamation action, an appellate court must, under *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), identify the preliminary facts the jury must have found, consider those facts and any undisputed facts to be true, and determine if actual malice is established under those facts, or is free to make *de novo* findings of preliminary facts, as the Eleventh Circuit did below.

PARTIES TO THE PROCEEDINGS

The following list identifies all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

Alan B. Levan
BankAtlantic Financial Corporation
Capital Cities/ABC, Inc.
William H. Willson

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following: BankAtlantic Financial Corporation is now known as BFC Financial Corporation. BFC Financial Corporation has no parent company, and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	3
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT	3
1. Evidence Regarding The Gist	6
2. Evidence Regarding Falsity	8
3. Evidence Regarding Actual Malice	9
4. The Opinion Below	13
REASONS FOR GRANTING THE PETITION	17
I. THE ELEVENTH CIRCUIT'S CONCLUSION THAT "INDEPENDENT REVIEW" EXTENDS TO THE PRELIMINARY FACTUAL QUESTIONS OF GIST AND FALSITY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS	19
II. THE ELEVENTH CIRCUIT IGNORED THE INQUIRY THIS COURT PRESCRIBED IN *CONNAUGHTON*	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 17, 19, 20
Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993) 16
Brown v. Petrolite Corp., 965 F.2d 38 (5th Cir. 1992) 24
Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 18
Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989) 30
Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997) 18
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .. 22
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) ..... *passim*
Kaelin v. Globe Communications Corp., 162 F.3d 1036 (9th Cir. 1998) 22
Lundell Mfg. Co. v. American Broad. Cos., 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) 20, 21, 23, 24
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 20, 21
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 20, 21
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 19, 22
Newton v. National Broad. Co., 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991) 18
Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556 (5th Cir. 1997) 14, 23, 24
Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988) 23
Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.) (*en banc*), *cert. denied*, 484 U.S. 870 (1987) 29

TABLE OF AUTHORITIES—Continued

Page

Weller v. American Broad. Cos., 232 Cal. App. 3d 991 (Cal. Ct. App. 1991) 24, 25

CONSTITUTION AND STATUTES

U.S. Const.:

Amend. I ..... *passim*
Amend. VII 2, 3, 24
Amend. XIV 2, 3
28 U.S.C. § 1254(1) 3

OTHER MATERIALS

Robert D. Sack, *Sack on Defamation* (3d ed. 1999) 18

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The jury in this defamation action found by a preponderance of the evidence that the producers of the ABC television newsmagazine "20/20" published a broadcast conveying the false message that petitioners deliberately misled their investors. The jury separately found by clear and convincing evidence that respondents published the broadcast with "actual malice"—knowledge of its falsity or substantial doubt as to its truth. The jury awarded damages totaling $10 million, and the district court entered judgment on that verdict.

In reversing the jury's verdict, the Eleventh Circuit panel ventured into an area of law it deemed "unsettled" and subject to "some confusion." The court then decided one of the two principal issues before it in a manner that conflicts with the decisions of other courts of appeals—

a conflict that the Eleventh Circuit itself acknowledged—and it decided the remaining issue in a manner that departs sharply from this Court's precedent.

First, believing that its "independent review" obligation under this Court's decisions extended not only to the question of actual malice but also to preliminary factual issues, the court of appeals took away from the trier of fact and decided for itself *de novo* the threshold questions of the broadcast's core message or "gist" and the falsity of that message. Before doing so, the court recognized that, if it accepted the version of the broadcast's gist petitioners urged at trial, the evidence tended to establish both falsity and actual malice. Other circuits, relying on this Court's decisions, have concluded that the determinations of gist and falsity are for the trier of fact and are not subject to "independent review" by appellate judges.

Second, disregarding this Court's guidance in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Eleventh Circuit made no effort, in conducting its "independent review," to identify the preliminary facts that the jury "must have" found to support a conclusion of actual malice. Instead, the court simply accepted as true most of respondents' view of the facts and ignored the contrary determinations the jury must have made.

Because it raises outcome-determinative issues that lie at the crossroads of the First, Seventh, and Fourteenth Amendments in defamation suits under state law, this case warrants this Court's plenary review. In *Connaughton*, this Court recognized its special responsibility to mark the limits of appellate review in actual malice cases. Ultimately, only this Court can determine how, in the context of "independent review," the First Amendment interacts with the states' application of defamation law, and the Seventh Amendment's guaranty of trial by jury.

The Court has not done so in nearly a decade. In light of the chasm between the Eleventh Circuit's view and the view of other courts of appeals concerning the breadth of an appellate court's ability to supplant the jury, and in light of the Eleventh Circuit's disregard of the analytical approach this Court prescribed in *Connaughton*, this case represents an especially suitable vehicle for exercise of that responsibility.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 190 F.3d 1230. The district court's order denying respondents' renewed motion for judgment as a matter of law or in the alternative for a new trial or remittitur (Pet. App. 29a-30a) is not reported.

JURISDICTION

The court of appeals entered judgment on September 29, 1999. Pursuant to the mandate issued by the court of appeals, the district court entered final judgment in favor of respondents on December 14, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the First, Seventh, and Fourteenth Amendments to the United States Constitution, U.S. Const. amends. I, VII, XIV. The relevant portions of these provisions are reproduced in the appendix (Pet. App. 73a).

STATEMENT

In this diversity libel action filed in February 1992, petitioners alleged that ABC and William H. Willson broadcast a defamatory story on "20/20" before a national audience of approximately 20 million viewers in November 1991. A pivotal issue in the seven-week jury trial concerned the central message or "gist" of the broad-

cast. Petitioners argued that the gist was that Mr. Levan and his company, BFC, had knowingly misled their investors.[1] The evidence included an admission by Mr. Willson, the broadcast's producer, that he knew prior to broadcast that *that* gist was simply untrue. Mr. Willson told the jury that he had listened to Mr. Levan describe the transactions on two separate occasions, and had concluded that Mr. Levan believed passionately in their fairness:

> Actually, I was hoping to get shots of Mr. Levan defending himself, what he believed—*defending what he believed was a very fair deal very passionately.* And when I met with him in the off-the-record meeting [and] at Congress, he did that, and I wished our viewers had the opportunity to see that.

42 Tr. 1624 (emphasis supplied).[2]

Faced with Mr. Willson's testimony, ABC sought to recharacterize the gist of the broadcast in a way that would not lead inexorably to a finding of actual malice. ABC argued to the jury that the gist was *not* that Mr. Levan and his company had knowingly misled their investors, but merely that the transactions were unfair to the investors. 62 Tr. 4548. Under ABC's theory, be-

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[1] Prior to trial, the U.S. Magistrate Judge assigned to the case agreed, concluding that the gist of the broadcast "lead[s] the average viewer to assume that [petitioners] knowingly tried to dupe the limited partners into accepting an unfair transaction." Pet. App. 71a; *see also id.* at 59a; 9 R203-18 (volume 9, document entry 203, page 18, of the record). The district court agreed. *See* Pet. App. 56a. ABC too embraced this version of the gist, at least before it discovered its witnesses would admit that this gist was knowingly false. For example, in attempting to secure summary judgment, ABC favorably cited the court's conclusion that "the broadcast . . . reported that [petitioners'] roll-up transaction 'was unfair to the limited partners, but that [petitioners] who knew better, endorsed it anyway' to their partners." 13 R276-1, 4.

[2] 42 Tr. 1624 refers to volume 42, page 1624, of the multi-volume trial transcript.

cause it had gathered information from sources critical of the transactions, it had ample basis for believing that the transactions were in fact unfair to investors.

ABC argued to the district court that the first question the jury must decide was the gist of the broadcast, 22 R451-29; and the court accepted ABC's proposed instructions on this issue:

> The first question before you that you must decide is: What was the gist, the core, the substance, the essential message of the broadcast? The gist is merely a summary of the heart of what the broadcast was about. In deciding what the gist of the broadcast was, you should consider the broadcast in its totality and assess it through the eyes of the average viewer. You should give the broadcast the meaning that the average viewer would have given it.

Pet. App. 45a.

The court presented the jury with a verdict form that required a response to each of the following questions as to each plaintiff and defendant:

> Has [Plaintiff] proved by the greater weight of the evidence that the gist of the broadcast was false?
>
> If your answer to Question 1 is yes, has [Plaintiff] proved by clear and convincing evidence that [Defendant] published the broadcast with knowledge of falsity or serious doubts as to its truth?
>
> If your answers to Questions 1 and 2 are yes, please set forth the amount of damages, if any, that [Defendant] should pay to [Plaintiff].

Id. at 31a-32a, 34a-35a.

The jury answered in the affirmative as to each plaintiff and defendant on each verdict form, and awarded damages totaling $10 million. *Id.*

1. *Evidence Regarding The Gist*

There was, indeed, substantial evidence from which the jury could reasonably have concluded, and in fact must have concluded, that the broadcast's gist was as petitioners had argued—that Mr. Levan and BFC had knowingly misled their investors—and that *that* gist was false. First and foremost, John Stossel, the reporter on the broadcast and the author of much of its copy, admitted that the gist he intended was that Mr. Levan *knowingly* misled his investors:

> Q. It was your intent to portray Mr. Levan as someone who knowingly misled his investors, was it not?
>
> A. Who misled his investors? Definitely.
>
> Q. Knowingly misled his investors?
>
> A. Yes, sir.

58 Tr. 3900.

The jury also viewed the videotape of the broadcast on a number of occasions, and heard testimony of ABC witnesses regarding how the core message of the story was constructed. The videotape revealed that a minimum of time was spent discussing the terms of the transaction, and a substantial amount of time was spent discussing Mr. Levan's background and wealth, and his numerous purported attempts to hide from ABC. P.Ex. 721v (plaintiffs' trial exhibit 721v). Shortly before airing the broadcast, 20/20's Executive Producer amended the story's introduction—which ABC viewed as its "headline" or "book jacket cover," 44 Tr. 1936; 47 Tr. 2553—to add the words "the man behind it wouldn't talk to us." 47 Tr. 2559-60. ABC knew this statement was false: Mr. Levan had met with ABC Producer Willson for most of a day, agreed that the discussion could be "on the record," repeatedly requested in writing to meet with ABC again,

and agreed to appear for a taped interview with Mr. Stossel pursuant to written ground rules—ground rules on which ABC later reneged. P.Ex. 1; P.Ex. 308A.1-A.4, P.Ex. 7; P.Ex. 8; 45 Tr. 2236-56; 46 Tr. 2316-24; 41 Tr. 1234-57; 35 Tr. 374-76. Mr. Willson approved the addition of "the man behind it wouldn't talk to us," 47 Tr. 2563, and admitted to the jury that its message was, "this guy has something to hide." 42 Tr. 1485-86. The evidence also reflected that, months before the broadcast, Mr. Willson had told Mr. Levan's lawyer, Eugene Stearns, that he would portray Mr. Levan in this fashion in order to prove his guilty knowledge. P.Ex. 7; 46 Tr. 2324-44.

The broadcast contained a number of additional segments that had nothing to do with the fairness of the transactions, but were created to suggest that Mr. Levan had something to hide, including: (1) a segment showing ABC cameras denied access to a "general partners' meeting" and suggesting a connection to Mr. Levan when in fact none existed; (2) a segment stating that ABC cameras were denied access to the offices of BFC's proxy solicitor, which Mr. Stossel admitted created the impression that there was "something going on in that building" that someone didn't want the public to see, 58 Tr. 3905-06, when, in fact, the same company handled proxy solicitations for ABC itself, *see id.*; (3) ABC's knowingly false explanation of the circumstances that led to the cancellation of the Levan interview with Mr. Stossel; (4) ABC's reporting of Mr. Levan's decision to testify before Congress in the absence of television cameras, P.Ex. 721v; (5) shots of Mr. Levan apparently avoiding ABC's cameras in the halls of Congress, editing out segments in which Mr. Levan spoke before those cameras, P.Ex. 189v; and (6) shots of the gates closing—symbolically on ABC and BFC investors—at the Levan home.

The jury heard Mr. Stossel, who wrote the script for the broadcast, admit that many of these segments would

lead a reasonable viewer to conclude that Mr. Levan was hiding from ABC. 47 Tr. 2649, 2666; 58 Tr. 3902, 3905-06. While ABC's head of standards and practices had voiced pre-broadcast concerns that one of these examples was "silly and unrelated" and that the attempt to gain access to the proxy solicitor made ABC "look like petulant fools," P.Ex. 9, the jury was able to view the notes from a meeting of 20/20's senior executives reflecting why these segments were included: those notes disclosed that these examples were strung together to cause the audience to ask, "what's he trying to hide?" 44 Tr. 2003-04; P.Ex. 82, at BB415. Thus, there was substantial evidence from which the jury must have concluded that ABC was able to fulfill Mr. Stossel's admitted goal of showing Mr. Levan as someone who had *knowingly* misled his investors, in part by portraying him as a man "with something to hide."

2. *Evidence Regarding Falsity*

Having accepted petitioners' view of the story's gist, the jury had substantial evidence from which it could reasonably conclude, and must have concluded, that this gist was false. In fact, Mr. Willson admitted it was false; he testified that he became convinced that Mr. Levan believed, as Mr. Willson put it, "very passionately" in the fairness of the transaction. 42 Tr. 1624; 42 Tr. 1538-39.

In addition to Mr. Willson's admission, there was undisputed evidence that Mr. Levan believed that the transactions were fair, 34 Tr. 244-48; 42 Tr. 1624; and the jury heard days of testimony and substantial evidence establishing that Mr. Levan's belief was well founded. That evidence showed, *inter alia*: that the transactions were designed to protect the investors from the abuses of "rollups," transactions undertaken by other real estate partnerships, 45 Tr. 2227-28; 35 Tr. 344-46; that the transactions required a majority vote of all investors, 34

Tr. 187; that investors who voted approved the transaction by a 2-1 margin, 57 Tr. 3675-78; that what BFC investors gave up was not "real estate" valued at over $44 million but limited partnership certificates that had, *prior* to the exchange, through no fault of petitioners, lost 90% or more of their value and continued to plummet in value, 34 Tr. 225-58; P.Ex. 458, at App.D; 59 Tr. 4067-71; 55 Tr. 3413-20; that the only expert offered by either party who actually compared what investors gave up to what they received in the exchange concluded that the transaction was fair, 38 Tr. 786-808; that what BFC gave the investors in return for their near-worthless certificates were bonds backed by the strength of its main asset, BankAtlantic, 34 Tr. 225-58; 39 Tr. 1006-08;[3] that Mr. Levan believed his plan for BankAtlantic was sound, and would inure to the benefit of the investors, and that time proved Mr. Levan correct, as BankAtlantic prospered, 34 Tr. 203-06; 35 Tr. 398; 40 Tr. 1040-42.

3. *Evidence Regarding Actual Malice*

The jury was required to consider next whether petitioners proved by clear and convincing evidence that ABC published the false broadcast with actual malice—which the court defined as "knowledge of its falsity or substan-

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[3] Expert Steven Goldstein concluded that the value of the BFC bonds given in exchange for the certificates was $21 million. 38 Tr. 794. Mr. Goldstein's analysis was based on his evaluation of BankAtlantic. While ABC's "fairness" experts harshly criticized the bonds, and while those critiques were heavily relied upon by the Eleventh Circuit, the jury recognized the two factors that made the investors willing to accept them. First, ABC's experts were admittedly ill-equipped to analyze BankAtlantic, and did not actually do so. 59 Tr. 4058-60, 4066-67; 55 Tr. 3424-29. Second, the limited partnership certificates that the investors held before the exchange had lost most of their value. ABC's experts admittedly did not focus on the certificates, 55 Tr. 3424-29, despite their acknowledgment that there was little or no market for the certificates at the time of the exchange, 59 Tr. 4066-71.

tial doubt as to its truth." Pet. App. 32a, 35a. The jury found that ABC had in fact acted with actual malice, and the record established a clear and convincing foundation for that finding.

In addition to Mr. Willson's admission that he knew that the core message of the broadcast was false, the jury considered additional direct evidence showing that ABC acted with knowledge of the falsity of its broadcast or substantial doubt as to its truth. Mr. Levan and Mr. Stearns testified that, at their five to six hour pre-broadcast meeting with Mr. Willson, Mr. Willson admitted that, despite the information he gathered from other sources, Mr. Levan's transactions were "completely different" from the "rollup" transactions that had been the subject of congressional scrutiny. 35 Tr. 344-46; 45 Tr. 2249. Mr. Willson said he had chosen to focus on Mr. Levan because television was a "visual medium" and the central figures in *abusive* rollups were bankrupt or had gone to jail. *See id.* They testified that Mr. Willson repeatedly announced what he intended to broadcast and, when it was explained why those charges simply were not true, repeatedly responded that "Truth is not my job," "I don't care about the truth," "The truth is irrelevant to me," or words to that effect. 35 Tr. 349-51, 367; 45 Tr. 2249-51; 46 Tr. 2331, 2344-45; P.Ex. 7, at 15; 41 Tr. 1239. Mr. Stearns testified, and the record contained his contemporaneous supporting documentation, that Mr. Willson repeated this statement several times over a period of months, in varying contexts, whenever he was so confronted. 45 Tr. 2249-51; 46 Tr. 2331, 2344-45; P.Ex. 7, at 15. The evidence also established that ABC knew that Mr. Levan was not hiding from ABC and that he had in fact repeatedly requested additional opportunities to meet with ABC representatives. 46 Tr. 2353; P.Ex. 7; P.Ex. 8; 45 Tr. 2344; 54 Tr. 3150-52. Nevertheless, ABC began its broadcast by announcing that Mr. Levan "wouldn't

talk to us," and included in its broadcast numerous purported examples of Mr. Levan avoiding ABC, all aimed at implying that Mr. Levan had something to hide.

ABC offered responsive evidence attempting to show, in part through Mr. Willson's testimony, that much of Mr. Levan's and Mr. Stearns' recollections of their lengthy meeting were untrue, and that, notwithstanding Mr. Stossel's admission, Mr. Willson did not mean to create the impression that Mr. Levan had knowingly misled his investors and hid from ABC. *See* 42 Tr. 1485-87, 1518-61. The jury was entirely free to reject Mr. Willson's credibility on these points and to credit instead petitioners' witnesses and Mr. Stossel's admission as to the message he intended in the broadcast.

The jury also considered substantial indirect evidence of actual malice, including evidence of ABC's deliberate attempts to blind itself to, or twist, the truth. While ABC argued to the jury and the Eleventh Circuit that it could not find sources who would speak in favor of the transaction, the evidence reflected that ABC sought only negative information and systematically weeded out investors and others who had positive views of the exchange. The jury reviewed ABC call sheets that described investors who voted in favor of the exchange as "not good" or "not angry enough." 40 Tr. 1157-72; P.Exs. 93-100. One investor contacted by ABC testified that ABC "was trying to get me to say that I didn't think [the exchange] was a fair deal." 40 Tr. 1144-46. When that investor refused to agree, the ABC representative "sort of went the other way with me and I never heard from her again." *Id.* His call sheet was marked, "not good." P.Ex. 96. ABC also refused to interview Steven Goldstein, a savings industry analyst and the former Deputy Director of Policy for the Federal Home Loan Bank Board, 38 Tr. 780-84, who

would ultimately be the only expert who offered an opinion on the fairness of the transaction based upon an analysis of BankAtlantic, 38 Tr. 786-808. *See* note 3, *supra.*

The jury also considered the fact that ABC had altered videotape of questions and answers supplied by Mr. Levan at ABC's request. P.Ex. 76; 46 Tr. 2371-72; 43 Tr. 1846; 42 Tr. 1600-05. ABC's contemporaneous notes reflected a direction from 20/20's Executive Producer to "make it look like it wasn't a good idea to send us tape." 44 Tr. 1999-2000; P.Ex. 82, at BB418. ABC did just that, replacing a benign question with a voice-over intended to suggest that Mr. Levan had purposely misled his investors while building a personal fortune, 47 Tr. 2663-64; 58 Tr. 3874, 3957, and editing another question and answer to fabricate an admission that Mr. Levan kept funds from the exchange for himself when in fact he had not, P.Ex. 76; P.Ex. 721v.

In addition, the evidence showed that ABC manipulated videotape to create an event that simply did not occur. Tape of a Congressman's introductory remarks made hours before Mr. Levan appeared to testify was doctored to create the impression that the Congressman had in fact reached a harsh conclusion *after* Mr. Levan's testimony, and delivered that conclusion to Mr. Levan personally.[4] 35 Tr. 379-80, 419; 40 Tr. 1120-31.

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[4] ABC failed to convince the jury, but was able to convince the Eleventh Circuit, to ignore this clear and convincing evidence, because it had relied on "independent sources" and testimony at a congressional hearing that criticized the transactions. There were a number of reasons why the jury would choose to reject this defense. First, as noted above, there was dramatic evidence proving that ABC shunned sources supporting the transactions. 40 Tr. 1157-72; P.Exs. 93-100. Second, none of the sources ABC chose stated that petitioners *knowingly* misled their investors. Third, ABC failed to dispute the fact that none of its sources who derided

Having found that ABC acted with actual malice, the jury then concluded that petitioners had been profoundly damaged and awarded damages totaling $10 million.

Post-trial, ABC asked the district court to overturn the jury's verdict. One of ABC's central arguments was that petitioners' view of the gist "enormously overstates the extent to which the 'essential message' of the broadcast concerned Mr. Levan's state of mind as to his limited partners." 26 R637-22. ABC insisted that the district court had the power and duty to revisit the gist of the broadcast, along with all other factual disputes, as part of its obligation to conduct an "independent review," and that it should accept as a matter of law the less damaging view of the gist ABC had offered. *See* 26 R637-5 to 42. The district court denied ABC's post-trial motions in their entirety. *See* Pet. App. 29a-30a.

4. *The Opinion Below*

The Eleventh Circuit vacated the district court's judgment and remanded the case with instructions to enter judgment for respondents. *See* Pet. App. 26a.

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the bonds offered an opinion on the *fairness of the transaction*: they could not, because none had compared the bonds to the nearly worthless certificates the investors chose (by a 2 to 1 margin, 57 Tr. 3675) to exchange for them. 54 Tr. 3230-32; 58 Tr. 3899; 59 Tr. 4075, 4114; 55 Tr. 3421-25. Fourth, the congressional hearing upon which ABC relied actually *concluded* favorably with Mr. Levan's testimony, at the end of which the Committee Chairman noted to Mr. Levan, "I like you. You are an interesting fellow." Mr. Levan then stated that he hoped he would not be invited back, and the hearing ended with laughter. 35 Tr. 380. The jury must have determined that, although ABC had videotaped hours of the hearing, the only tape actually included in the broadcast was that of Congressman Bliley's introductory remarks that had been doctored to imply a face-to-face confrontation with Mr. Levan. Finally, the jury must have believed Mr. Stearns and Mr. Levan, who testified that, despite these "independent sources," Mr. Willson expressed to them substantial doubts regarding the core message ABC would ultimately broadcast.

The Eleventh Circuit's conclusion admittedly hinged on its understanding of an appellate court's proper role in reviewing a libel verdict in a public-figure case. The court began with the principle, drawn from this Court's decisions, that a reviewing court must conduct "an 'independent examination of the entire record' . . . to determine whether the evidence offered at trial supports a finding of actual malice." *Id.* at 16a-17a. It perceived "some confusion," however, concerning "how this review relates to factual findings made by the jury," *id.* at 17a. Specifically, the court believed that "the law is unsettled as to the deference that we give to 'facts' found by the jury." *Id.* at 17a, n.27. While acknowledging (with a "*but see*" reference) the Fifth Circuit's holding that "no special review is accorded to 'preliminary factual issues,'" *id.* at 17a (citing *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997)), the court nonetheless proceeded on the assumption that—apart from "credibility determinations," which "are reviewed under a clearly erroneous standard because of the jury's 'opportunity to observe the demeanor of the witnesses,'" *id.*—its "independent review" obligation extends not only to the question of actual malice, but also to the dispute concerning the broadcast's "gist." *Id.* at 18a. As the court stated, "[o]ur first job . . . is to determine the gist or sting of the report." *Id.*[5]

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[5] The court of appeals stated that "[t]he parties agree that we must determine what the report, taken as a whole, is actually alleging about Levan, and then determine if ABC broadcast that meaning with actual malice." Pet. App. 18a, n.28. But petitioners never agreed to any such thing. On the contrary, petitioners vigorously disputed ABC's argument to that effect, as the following excerpt from petitioners' reply brief on appeal demonstrates:

> In our first brief, we noted that even ABC recognized the determination of the "gist" as a jury question. PB24. ABC, however, argues that as part of its "independent review" under the five-Justice majority opinion in *Bose Corp. v. Con-*

The court recognized that "the 'gist' or 'sting' of an alleged defamatory statement is a factual question," *id.* at 18a, n.28—a question that was hotly contested at trial in this case, that the jury resolved in petitioners' favor, and that was pivotal to the outcome on appeal. ABC argued, both at trial and on appeal, that the gist of the broadcast was merely that the rollups were unfair; in contrast, petitioners argued—and the jury must have found—that the gist was that Mr. Levan *knowingly* misled the limited partners into accepting the rollup transaction. Petitioners presented compelling evidence of "statements by ABC employees that they believed that Levan thought the transaction *was* fair," *id.* at 19a, n.30. The court accordingly acknowledged that

> [i]f the gist of the broadcast was, as [petitioners] contend, that Levan knowingly misled his investors, then these statements tend to demonstrate that [respondents] entertained serious doubts that the gist of their story was true.

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sumers Union of U.S., Inc., 466 U.S. 485 (1984), "it is for this Court to decide [apparently *de novo*] what the broadcast said." RB23. ABC overstates the boundaries of "independent review." Immediately after recognizing *Bose*'s "enhanced appellate review," the Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), defined the "dispositive question" to be "whether a reasonable fact finder could conclude" that the statements implied a provably defamatory meaning. Post-*Milkovich*, in *Weller v. American Broadcasting Cos.*, 232 Cal. App. 3d 991 ([Cal. Ct. App.] 1991), after a $2.3 million jury verdict, ABC argued on appeal (as they do here) that its broadcast had an innocent message. The *Weller* court told ABC that their argument "misses the point": "If the broadcasts could reasonably have been understood as implying the defamatory statements upon which respondents based their claim, but also could have been understood in an innocent sense, the jury must decide the manner the broadcasts were ultimately understood." *Id.* at 1003.

Appellees' Reply Brief at 4 n.1.

Id. The court nonetheless considered itself free to make its own *de novo* determination of the broadcast's gist. That was so, in the court's view, because (1) "the gist of the report is intertwined with Levan's allegations of actual malice," [6] and (2) "[u]nlike other factual findings, ascertaining the gist does not depend on resolving credibility issues, which are better left to the factfinder." *Id.* at 18a, n.29.

Having acknowledged that actual malice would be established if petitioners'—and the jury's—view of the gist were accepted, the court then reported the results of its own, *de novo* review of the broadcast. The gist of the story, according to the court, was that "the limited partners got a raw deal, one so bad that a viewer would believe Levan *must* have known the deal was unfair to his limited partners, particularly in light of his financial expertise." *Id.* at 19a.

The court turned next to the question whether, given this judicially defined gist, the record "established actual malice by clear and convincing evidence." *Id.* at 20a. In conducting this aspect of its independent review, the court ignored the approach laid out in *Connaughton*, where this Court identified the facts that the jury "must have" found and then considered whether, in light of those findings and the undisputed evidence, petitioners had

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[6] The only support the court cited for this proposition was its own prior decision in *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993), a case that did not involve actual malice, but in which the court suggested that *Bose* subjects *all* factual questions in a First Amendment case to "independent review." *See id.* at 1120 ("in cases involving First Amendment claims, an appellate court must undertake independent review of the record in order to make sure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression") (internal quotation marks and brackets omitted).

clearly and convincingly established actual malice. Instead, the court of appeals examined the evidence without regard to the jury's determinations, resolved for itself key factual disputes that the parties had presented to the jury, and even took judicial notice of information helpful to ABC.[7] On the basis of this unbridled inquiry, the court concluded that ABC had "overwhelming evidence . . . to support the broadcast's conclusion that the rollup was unfair to limited partners," evidence that the court claimed was mostly "undisputed." *Id.* at 17a, n.27.[8]

REASONS FOR GRANTING THE PETITION

This case squarely presents an important question of federal constitutional law that the court below considered "unsettled" and subject to "some confusion," and on which the court acknowledged a split in the circuits. The federal courts of appeals are indeed divided on whether the "independent review" contemplated by this Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), is limited to the question of actual malice, or should extend as well to threshold factual questions of gist and falsity. The Third, Fifth, Eighth, and Ninth Circuits have taken the position that it should not be so extended—a position that finds strong support in the decisions of this Court. By contrast, the Eleventh Circuit has held that it should.

Even if the Eleventh Circuit were correct in subjecting the preliminary factual questions of gist and falsity to

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[7] To support its view regarding the preliminary factual issue of the fairness of the transaction, the court *sua sponte* took judicial notice of the Federal Reserve Board's reported Prime Rate of interest on the day BFC issued its 1989 prospectus, to argue that the bonds' yield was lower than that rate. Pet. App. 8a, n.12. This was a fact neither argued by ABC nor presented to the jury.

[8] As noted below, this evidence was, in fact, hotly disputed.

independent review, the court still erred by ignoring this Court's instructions in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), prescribing the proper *method* of conducting that review. In *Connaughton*, this Court instructed that, in conducting independent review, a court of appeals' first step must be to identify the facts the jury "must have" found to support a finding of actual malice; then, accepting those facts and any undisputed evidence as true, the appellate court must conduct an independent review to determine whether actual malice exists under those facts. The Eleventh Circuit undertook no such effort. To the contrary, it accepted most of ABC's facts as true and ignored facts and inferences to the contrary.

The court below has not been alone in its confusion. Courts and commentators viewing the state of the law in the decade after *Bose* and *Connaughton* have more generally noted a lack of clarity.[9] That lack of clarity has led to circuit conflict. This Court has recognized that it has a unique responsibility to provide guidance on this issue. As the Court stated in *Bose*, "this Court's role in mark-

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[9] One commentator who often sided with the media on these issues noted that "*Bose* and *Connaughton*, both difficult cases, wrestle with the independent review problem but do not quite resolve it. The extent to and circumstances under which a reviewing court in a public figure or public-official defamation suit may or must bow to the credibility judgments, expertise, factual familiarity, or general role of trial courts and trial juries remain muddy." Robert D. Sack, *Sack on Defamation* § 16.5.5.3 (3d ed. 1999). The Seventh Circuit made reference to the "knotty constitutional issue regarding what constitutes independent review," an issue it chose to avoid. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). The Ninth Circuit has noted that striking the proper balance between the First Amendment and deference to juries is a "daunting task." *Newton v. National Broad. Co.*, 930 F.2d 662, 666 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991). "This is no doubt a difficult business." *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997).

ing the limits of this standard through the process of case-by-case adjudication is of special importance." *Bose*, 466 U.S. at 503; *accord Connaughton*, 491 U.S. at 686. It is now appropriate for this Court again to exercise that role.

I. THE ELEVENTH CIRCUIT'S CONCLUSION THAT "INDEPENDENT REVIEW" EXTENDS TO THE PRELIMINARY FACTUAL QUESTIONS OF GIST AND FALSITY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

1. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court held that the First Amendment places limits on the application of the state law of defamation. This Court ruled that, where the plaintiff in a defamation case is a public figure, liability may not be imposed unless there is clear and convincing evidence that the defendant acted with so-called " 'actual malice'—that is, with knowledge that [the defendant's publication] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *Bose*, this Court concluded that, in this respect, appellate review must be more probing than normal. According to *Bose*, an appellate court must conduct an "independent review" to determine whether the evidence clearly and convincingly establishes actual malice. *Bose*, 466 U.S. at 511.

At the same time, however, the *Bose* Court made clear that the "independent review" requirement applies *only* to the question of actual malice:

> The independent review function is not equivalent to a "*de novo*" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing court determines that actual malice has been established with convincing clarity,

> the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact.

Id. at 514 n.31; *see id.* at 511; *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522-25 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

2. In the wake of *Bose*, lower courts have disagreed as to the proper reach of independent review. As explained more fully below, the Third, Fifth, Eighth, and Ninth Circuits have correctly ruled that independent review applies only to the question of actual malice, and not as the Eleventh Circuit held below to preliminary questions of gist and falsity—questions so distinct from actual malice that they are subject to a different standard of proof at trial. There is thus a clear conflict on an issue that is often outcome determinative in defamation actions.

The view that independent review applies only to the question of actual malice is extensively articulated in *Lundell Manufacturing Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). In *Lundell*, as here, the outcome of the case turned largely on the "gist" of an ABC television broadcast. The broadcast there reported, among other things, that a machine built by plaintiff Lundell "d[id] not work." *Id.* at 355. Lundell argued that the gist of the broadcast was that the machine was not mechanically sound, which ABC conceded was untrue. *Id.* ABC argued that the gist of the story was instead that the machine "did not work in a financially viable manner," which (ABC said) *was* true. *Id.* The jury rejected ABC's view and awarded substantial damages to Lundell. *Id.*

On appeal, ABC argued that, because "findings of falsity and substantial truth are subject to constitutional rules requiring independent review," the court should determine the gist of the story itself. *Id.* at 357. Lundell,

on the other hand, argued that the independent review mandated by this Court applied *only* to questions of actual malice, not to questions of gist and falsity. *See id.* The Eighth Circuit agreed with Lundell, concluding that the questions of gist and falsity were subject only to "substantial evidence" review. *See id.* at 357-62.

In reaching this conclusion, the *Lundell* court relied on *Masson*, in which the question of actual malice turned in part on the meaning and falsity of six passages in a magazine article, and in which this Court concluded that summary judgment was inappropriate because the meaning of the passages was a question for the jury. The Eighth Circuit explained:

> *Masson* makes abundantly clear that in reviewing a summary judgment ruling, which involves a similar standard as a review of a directed verdict ruling, we examine the evidence in the light most favorable to the plaintiff and decide if there is sufficient evidence to support a jury finding of falsity.

Id. at 358 (citing *Masson*, 501 U.S. at 522-25). The Eighth Circuit drew further support from *Milkovich*, in which this Court overturned a summary judgment in a defamation case. The *Lundell* court viewed *Milkovich* as rejecting the notion that independent review covers the question of the meaning of a published statement. *See id.* (citing *Milkovich*, 497 U.S. at 12).[10]

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[10] The Eighth Circuit also rejected the notion that *Masson* and *Milkovich* could be distinguished on the ground that, because they were decided on summary judgment, they did not bear on the duty of appellate courts to conduct an independent review of jury verdicts after they have been rendered. As the Eighth Circuit observed with regard to *Milkovich*: "The Court allowed the defamation action to go forward, ruling that a reasonable trier of fact could find that the [publication] could be interpreted as a false assertion of fact. Had the Court believed it must independently decide whether a statement constituted a false statement of fact, the Court would not have used this inquiry." *Lundell*, 98 F.3d at 358 (internal quotation marks and citations omitted).

Lundell, therefore, is in conflict with the Eleventh Circuit's decision in this case. As ABC correctly acknowledged in the district court below, the propositions upon which *Lundell* was based "run directly counter to" Eleventh Circuit law. 34 R626-14 n.11.[11]

The Eighth Circuit's conclusion is in accord with the decisions of other courts of appeals. For example, the Ninth Circuit reached a similar conclusion in *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998). At issue was a newspaper story about Kato Kaelin that led with the headline, "COPS THINK KATO DID IT! . . . he fears they want him for perjury, say his pals." *Id.* at 1038. Kaelin sued, arguing that the headline falsely implied that the police suspected him of a well-publicized murder. The Ninth Circuit reversed the district court's grant of summary judgment for defendant Globe, holding:

> Globe argues that the "it" refers to perjury. Even assuming that such a reading is reasonably possible, it is not the only reading that is reasonably possible as a matter of law. So long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists.

Id. at 1040; *see id.* at 1041. Plainly, then, the Ninth Circuit determined that, in a public figure/actual malice case,

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11 Despite this admission, ABC attempted to distinguish *Lundell* in the district court by arguing that Lundell was not a public figure, and that therefore the state of mind standard set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (requiring only negligence as to falsity), applied instead of the standard set forth in *New York Times Co. v. Sullivan* (requiring knowledge or recklessness as to falsity). For present purposes, however, this distinction makes no difference. As illustrated by the Eighth Circuit's analysis, ABC's argument that substantive federal rules concerning the defendant's state of mind as to falsity necessarily require independent review of the preliminary issue of falsity follows the same path under either standard. Indeed, the Eighth Circuit in *Lundell* rested its analysis on its reading of actual malice decisions.

the preliminary questions of gist and falsity are questions for the jury to determine.[12]

To similar effect is *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988), a case cited by the *Lundell* court in support of its holding. 98 F.3d at 358. *Schiavone* concerned a report in Time magazine that "the name of [New Jersey construction company] Schiavone appeared several times in the [FBI's] reports on the 1975 disappearance of former Teamsters Boss Jimmy Hoffa." 847 F.2d at 1074. Although determining that Schiavone was a public figure for purposes of First Amendment law, the court of appeals held that Time was not entitled to summary judgment on actual malice grounds. The court also reversed the district court's determination of the preliminary issue of the gist of Time's report, saying that "a jury must resolve the question of the sting because reasonable persons could differ on that question." *Id.* at 1084; *see also id.* at 1081, 1091.

In addition, the Eleventh Circuit in the present case recognized that its approach conflicted with that of the Fifth Circuit. Although the Eleventh Circuit stated that "most courts show less deference [than the clearly erroneous standard] when fact-finding 'rel[ies] on weighing of evidence and drawing of inferences,'" it acknowledged that the Fifth Circuit took a contrary view in *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997), holding that "no special review is accorded to 'preliminary factual issues.'" Pet. App. 17a. Indeed, both *Scalamandre* and an earlier Fifth Circuit de-

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[12] In an earlier decision, *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991), the Ninth Circuit struggled with striking the proper balance between the First Amendment and deference to juries, noting that it was a "daunting task." *Id.* at 666. The *Newton* court recognized a "credibility exception" to independent review, but was not called upon to decide whether the preliminary questions of gist and falsity were subject to such review. *Id.* at 671.

cision, *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992), expressly limited the boundaries of *Bose* "independent review" to "the ultimate finding of actual malice," stating that there was no need to "conduct de novo review of the jury's determination of preliminary factual issues or questions of credibility." *Id.* at 46; *see Scalamandre*, 113 F.3d at 560.

3. The clear split in the circuits is not diminished by the Eleventh Circuit's suggestion that, in this case, "the gist of the report is intertwined with Levan's allegations of actual malice, which we must subject to independent review." Pet. App. 18a, n.29. The same could have been said in each of the cases discussed above. For example, in *Lundell*, the dispute over the broadcast's gist—what would a reasonable person understand "it doesn't work" to mean?—was determinative of liability. Similarly, in *Kaelin*, alternative determinations of the gist—to what would a reasonable person think the "it" in the headline referred?—would have led to different conclusions on actual malice. In *Masson*, as the *Lundell* court noted, "the Supreme Court's analysis of actual malice required it to consider the concept of falsity." 98 F.3d at 358. If independent review were applied to gist and falsity in each such circumstance, appellate courts would ultimately make *de novo* findings of most key factual questions in most defamation cases, and there would be little left of the Seventh Amendment right to trial by jury.[13]

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[13] A common defense tactic employed by ABC and other journalists has been to define a milder "gist" and insist that its producers did not mean to convey the more obvious, and more damaging, message. This was true in both *Lundell* and *Kaelin*. In addition, in *Weller v. American Broadcasting Cos.*, 232 Cal. App. 3d 991 (Cal. Ct. App. 1991), after a jury verdict, the court recognized that the broadcast "could have been understood as implying that Weller had, at worst, knowingly sold stolen property," and, as here, that the implication was conveyed, *inter alia*, by "suggesting Weller was avoiding publicity and had a guilty conscience." *Id.* at 1002. ABC argued on appeal, as in this case, that the average viewer

II. THE ELEVENTH CIRCUIT IGNORED THE INQUIRY THIS COURT PRESCRIBED IN *CONNAUGHTON*

Even if the Eleventh Circuit were correct as to the *scope* of independent review, it still erred by disregarding the instructions as to the *method* of such review this Court provided in *Connaughton*. In *Connaughton*, the Sixth Circuit, in the course of upholding a plaintiff's verdict, identified eleven facts that the jury "could have found" (findings that, according to the Sixth Circuit, would not have been clearly erroneous) and determined that those facts added up to a clear and convincing showing of actual malice. *See Connaughton*, 491 U.S. at 689-90. This Court affirmed, but chose to rest its decision on what it deemed "a less speculative ground." *Id.* at 690. This Court identified three facts that the jury "must have" found and considered them alongside the undisputed evidence in the case. *Id.* at 690-91. Under that analysis, this Court concluded that "actual malice inexorably follows." *Id.*[14]

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might have understood the broadcast to imply a less toxic core message. The *Weller* court upheld the verdict, stating that ABC's argument "misses the point." *See* note 5, *supra*.

[14] In a concurring opinion, Justice Scalia stated that the Court "is correct insofar as the critical point of deference to the jury's findings is concerned," *Connaughton*, 491 U.S. at 700 (Scalia, J., concurring in the judgment): "it accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony." *Id.* at 698. Justice Scalia favored the Sixth Circuit's approach, believing that the appellate court should "assum[e] all of the facts that could reasonably be found in favor of the plaintiff were found in favor of the plaintiff," rather than attempt to identify which facts the jury "must have" found. *Id.* at 697. Justices Kennedy and White and the Chief Justice concurred, each noting their belief that Justice Scalia's views were consistent with the Court's opinion. *Id.* at 694 (White, J., concurring), 696 (Kennedy, J., concurring). Nothing in the majority's opinion rejected those views; the majority apparently determined simply that it could affirm even when applying the more exacting "must have found" standard.

In the decision below, the Eleventh Circuit simply ignored *Connaughton*'s guidance: it never made any attempt to determine what the jury "must have" found. Had the Eleventh Circuit done so, it would have recognized that the jury must have found facts that led inexorably to actual malice. *First*, the jury must have found that the core message of the broadcast was that Mr. Levan and BFC knowingly misled their investors. *Second*, the jury must have found that, as Mr. Willson admitted, ABC knew that the gist (thus understood) was false: as Mr. Willson himself testified at trial, Mr. Willson had concluded that Mr. Levan believed "passionately" in the fairness of the transaction. From these preliminary facts alone, a finding of actual malice would inexorably follow.[15]

In *Connaughton*, it is unclear whether the majority's acceptance of only the facts the jury "must have found" as "a less speculative ground" for decision was unique to that case, causing courts to look to the facts the jury "could have found" (as Justice Scalia favored) in other cases. If the appellate court is charged with identifying the facts the jury "could have found," the array of facts that the jury could have found in the present case includes the following:

> —That Mr. Stearns, Mr. Levan, and Richard Auletta were credible, and that Mr. Willson's testimony was not credible regarding their lengthy meeting; that, even if the gist of the broadcast dealt with "fairness," Mr. Willson effectively accepted at the meeting that the transactions were indeed fair; that he said he would continue to focus on Mr. Levan because other, culpable targets were unavailable;

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[15] Indeed, actual malice follows from the Eleventh Circuit's *de novo* view of the gist: If ABC knew that Mr. Levan believed passionately in the fairness of the transaction, but presented a core message that the deal was "so bad that a viewer would believe Levan *must* have known the deal was unfair" (as the court defined that message), then ABC knew its core message was false.

that, when asked how he could broadcast information he knew to be untrue, he responded repeatedly "the truth is irrelevant" or "I don't care about the truth"; and that this repeated statement reflected not (as Mr. Willson explained and the Eleventh Circuit accepted) a desire "to provide both sides of the story," Pet. App. 21a, but, as Mr. Stearns wrote to ABC, "a reckless disregard for the truth."

—That ABC was not credible regarding its claim (wholly accepted by the Eleventh Circuit) that it could find only a "vast number of objective sources" that "condemned the rollups," *id.* at 26a; that ABC attempted to get investors to state that the transactions were unfair, and, when it failed, rejected them as sources, noting that they were "not good" and "not angry enough"; and that ABC rejected experts with contrasting views.

—That Mr. Levan's interview with ABC was canceled, not because (as the Eleventh Circuit concluded) "the parties could not agree on the ground rules for the interview," *id.* at 12a, but because, as three witnesses testified, ABC reneged on those ground rules, which had been reduced to writing; and that the broadcast's explanation of the cancellation, and the implication that Mr. Levan lied to and hid from ABC, was knowingly false.

—That ABC knew that its assertion that "the man behind it wouldn't talk to us" and the repeated implications that Mr. Levan was hiding were untrue; the jury found that Mr. Levan had talked with ABC, on the record, and requested additional meetings; and that ABC had refused to meet.

—That ABC knowingly manipulated videotape to create statements and implications never made, and to create an event that did not happen.

The Eleventh Circuit avoided the *Connaughton* analysis, and claimed that "most" of the evidence that "related to actual malice" was "undisputed." This led to the backbone of the Eleventh Circuit's opinion: its own, *de novo* factual conclusion that the transaction was unfair. The court devoted the lion's share of the beginning and end of its opinion to a recitation of the facts that ABC presented to support that conclusion. To reach the conclusion that this issue was essentially "undisputed," the court ignored literally days of evidence explaining why the exchange transactions were fair, and were designed to be fair, including the following:

—The court found that the investors gave up "valuable partnership assets" (Pet. App. 21a); but the jury heard evidence that those "assets" had lost 90% of their value, and that investors were anxious to exchange those "assets" for an instrument backed by the strength of BankAtlantic, which ultimately prospered.

—The court repeated that "BFC acquired a total of $46 million in assets . . . in the exchange" (*id.* at 4a, 6a); but the jury considered unrefuted evidence that those assets had a market value of $16 million.

—The court noted that "many [unnamed] experts questioned why Levan recommended the exchange" rather than "selling the properties on behalf of the partnership" (*id.* at 10a); but in fact *both* of ABC's trial experts testified that it would have been a breach of fiduciary duty for Mr. Levan to have sold the assets for the partnerships. 55 Tr. 3408-10; 26 Tr. 4080, 4083.

—According to the court, sources told ABC that the bonds were "junk";[16] but the jury rightfully

[16] The jury heard evidence that the term "junk" was a term of art used to describe all bonds that were "below investment grade." 38 Tr. 825. In contrast, the Eleventh Circuit wrote that "Junks

> focused on the question, "what did the investors give up for those bonds?" Only petitioners offered evidence that actually compared the bonds to what the investors gave up—not "real estate," but limited partnership certificates with a value that was plummeting daily.[17]

If the Eleventh Circuit had followed *Connaughton*, these facts not only would have been recognized in the court's opinion, but would have been accepted. Instead, they were ignored or explained away, leading to the court's mistaken conclusion that the evidence of actual malice was actually "undisputed." Pet. App. 18a, n.28.

The analysis conducted by the Eleventh Circuit is the polar opposite of the analysis that this Court conducted in *Connaughton*.[18] At the end of a seven-week trial, the

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[sic] bonds are bonds that have a high risk of nonpayment and therefore yield a high interest rate." Pet. App. 8a.

[17] The court's conclusion that "a person even mildly familiar with investments would conclude that the transactions were unfair," Pet. App. 23a, begs the question, "why would two-thirds of the investors vote in favor of it?" The evidence established that the investors needed to meet suitability requirements before being allowed to invest—and were, therefore, at least "mildly familiar with investments"—and included compelling reasons why those investors would accept the exchange. Yet the only explanation the court offered is the one that ABC proffered, an explanation the jury could reasonably have rejected: "Many of the experts were of the opinion that limited partners probably voted for the transactions because they did not read, or could not understand, the three-hundred-plus page prospectuses that disclosed the terms of the exchanges." *Id.* at 6a, n.8. This hardly reflects a view of the evidence in "a light most favorable to plaintiffs." The jury rejected the notion that the investors were either lazy or duped. The Eleventh Circuit drew its own, opposite conclusion.

[18] The Eleventh Circuit's analysis evokes the critique offered by the Sixth Circuit in *Connaughton* in reviewing the D.C. Circuit's opinion in *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.) (*en banc*), *cert. denied*, 484 U.S. 870 (1987): "[I]t would appear that the court in fact ignored this standard and instead elected to selectively re-examine the evidence to arrive at what *the court itself* thought

jury was presented with overwhelming evidence establishing that the exchange transactions were indeed fair, that Mr. Levan certainly believed they were fair, that ABC concluded that Mr. Levan believed in the fairness of the transactions, and that ABC nonetheless broadcast a story telling America that Mr. Levan had knowingly misled his investors. Pursuant to *Connaughton*, and as part of its independent review of the record to determine whether the evidence convincingly established actual malice, the Eleventh Circuit had a duty to identify those facts. Instead of conducting its review in this manner, the court chose instead to pick and choose among the facts and view them in a light most favorable to ABC. This Court should grant certiorari to clarify that appellate courts have no license to supplant the jury so thoroughly and to conduct their independent review without regard to any constraining principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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would be a more reasonable interpretation of the facts." *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 840 n.8 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989).